Supreme Court, U.S.
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No. 86-117

In the Supreme Court of the United States

OCTOBER TERM, 1986

RAJINDER SINGH SACHDEV, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Immigration and Naturalization Service (INS) is precluded from deporting petitioner for entering the country with an invalid visa (issued to him as an unmarried son of a lawful permanent resident), on the ground that the INS did not notify him of the invalidity prior to his leaving his homeland, where petitioner had married prior to entering the United States and had failed to inform the INS of that fact.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 788 F.2d 912. The decisions of the Board of Immigration Appeals (BIA) dismissing petitioner's appeal (Pet. App. 6a-10a), denying his first motion for reconsideration (Pet. App. 11a-12a), and denying his application for a stay of deportation pending the BIA's adjudication of his second motion for reconsideration (Pet. App. 13a) are unreported. The BIA's decision denying petitioner's second motion for reconsideration (App., *infra*, 1a-3a), rendered on September 4, 1986, is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1986. The petition for a writ of certiorari was filed on July 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

1. Petitioner entered the United States on September 12, 1982, with an immigrant visa issued to him by the American Embassy in India. Petitioner's father had filed an immigrant visa petition on his behalf, and the Immigration and Naturalization Service (INS) had approved the petition based on petitioner's "second preference" status as the unmarried son of a lawful permanent resident of the United States.[1] On the basis of the approved petition, petitioner had applied for and received an immigrant visa. Pet. App. 2a.

On July 4, 1982, one week after submitting his visa application to the American Embassy, petitioner married. Without informing immigration officials of the change in his marital status, petitioner thereafter entered the United States. Pet. App. 2a-3a.

On June 7, 1983, petitioner filed an immigrant visa petition on behalf of his wife and his newborn son, seeking their admission to the United States. The petition listed the date of his marriage and thereby alerted INS officials to the fact that petitioner had married prior to entering the United States. Pet. App. 3a.

2. On July 3, 1983, the INS commenced deportation proceedings against petitioner, alleging that petitioner's marriage made him ineligible to enter the United States by

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[1] Unless otherwise exempt, aliens seeking to immigrate to the United States must obtain an immigrant visa under the preference scheme set forth by Congress in 8 U.S.C. 1153. Pursuant to 8 U.S.C. 1154, a lawful permanent resident may file a visa petition to classify his or her alien unmarried son or daughter as a "second preference" immigrant under 8 U.S.C. 1153(a)(2) (first preference being limited, under 8 U.S.C. 1153(a)(1), to unmarried children of American citizens).

means of a "second preference" visa.[2] At the deportation hearing, petitioner admitted the allegations relating to the time, place and manner of his entry into the United States, his citizenship and his marriage. Petitioner contended, however, that American consular officials had failed to inform him in his own language that marriage prior to entry into the United States would nullify his visa preference status, and that the government therefore should be estopped from deporting him. On November 23, 1983, the immigration judge found petitioner deportable. Pet. App. 3a-4a, 6a-10a.

On March 7, 1985, the BIA dismissed petitioner's appeal from the immigration judge's decision. Based on the evidentiary record, the BIA found that the consular officials had properly relied on petitioner's representations that he could read and write English when they presented to him for examination and signature a form (known as a Form OF-237) explaining that marriage prior to entry would invalidate the immigrant visa. Pet. App. 7a-10a.

Petitioner subsequently filed a motion for reconsideration with the BIA. In his motion, petitioner alleged that there was insufficient evidence to show that his marriage was bona fide, that his due process rights were violated by the consular officials' failure to translate the Form OF-237 into his native language, and that the authenticity of his signature on the Form OF-237 had not been established. The BIA denied petitioner's motion on June 20, 1985. Pet. App. 11a-12a.

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[2] Under 8 U.S.C. 1251(a)(1), deportation is authorized with respect to any alien who, at the time of his entry into the United States, was excludable under the law existing at the time of such entry. Petitioner was excludable under 8 U.S.C. 1182(a)(20), which provides for the exclusion of "any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by [the Immigration and Nationality Act] * * *."

Petitioner subsequently moved for reconsideration with the BIA and also moved for a stay of deportation pending the BIA's adjudication of that motion. In addition to reiterating his past contentions, petitioner raised, for the first time, the claim that he had received untimely notice of the revocation of his approved immigrant visa petition, in violation of 8 U.S.C. 1155.[3] On July 26, 1985, the BIA denied petitioner's application for a stay of deportation, noting that petitioner's motion had little likelihood of being granted. Pet. App. 13a. The BIA denied petitioner's second motion for reconsideration on September 4, 1986, ruling that Section 1155 did not prevent the exclusion or deportation of an alien who did not receive notification of the invalidity of his visa prior to leaving his homeland (App., *infra*, 1a-3a).[4]

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[3] 8 U.S.C. 1155 provides:

> The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under [8 U.S.C. 1154]. Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by [8 U.S.C. 1225 and 1226].

[4] Although the BIA had not yet ruled on petitioner's second motion to reconsider at the time the case was decided by the court of appeals, the government noted in its brief to that court (Gov't Br. 16 n.*) that, in light of the Board's denial of petitioner's application for a stay, there was little likelihood that the BIA would grant his second motion to reconsider. Cf. *Barefoot* v. *Estelle*, 463 U.S. 880, 888-892 (1983) (while court of appeals in death penalty case did not formally affirm the district court, its denial of the motion for a stay of execution was in substance a resolution on the merits).

3. After the denial of his motion for a stay, petitioner sought review in the court of appeals. On April 22, 1986, the court of appeals denied the petition for review. It rejected petitioner's contention that the INS was precluded from deporting him because of its failure to notify him of the revocation of his visa prior to his entry into the United States. In reaching its decision, the court relied upon the BIA's decision in *In re Alarcon*, 17 I. & N. Dec. 574 (1980), in which the BIA ruled that the notice provision of 8 U.S.C. 1155 was inapplicable once the alien actually sought admission into this country, and that a deportation proceeding provided a fair and adequate opportunity for the alien to rebut the charge that his visa was invalid. The court indicated that the BIA's interpretation of Section 1155 was entitled to substantial deference, particularly in the absence of contrary authority. Pet. App. 3a-4a. The court further observed that to forbid the INS from deporting an alien such as petitioner, who had received an immigrant visa based on his unmarried status and who subsequently entered the United States without informing the INS of his change in status, "would invite fraud by petitioners seeking similar preference status" (*id.* at 3a).[5]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

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[5] The court also rejected petitioner's claim – which is not renewed in this Court – that the INS was estopped from deporting him because of the consular officials' failure to notify him in his native language that marriage would nullify his visa preference status. It reasoned that the consular officials were justified in providing only an English language warning in reliance on petitioner's own assertions that he could read and write English. Pet. App. 4a-5a.

Relying on 8 U.S.C. 1155, petitioner asserts (Pet. 5, 7) that once an alien commences his journey to the United States, the INS may not later deport him on the ground that he entered the country with an invalid visa. Petitioner "concedes that his visa was revoked" prior to his departure from India (*id.* at 5),[6] but claims that the revocation never took effect because he was not notified prior to leaving his country (*ibid.*). That claim is without merit.

Petitioner notes (Pet. 5) that under 8 U.S.C. 1155, revocation of an alien's visa petition must be accompanied by notice to the alien before he commences his journey and that such revocation shall have no effect absent valid notice. What he fails to recognize, however, is that the same statutory provision also states that "[i]f notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by sections 1225 and 1226 [governing exclusion of aliens]." Thus, the statute makes clear that the government's failure to give notice to an alien prior to his departure for this country does not prohibit the government from later excluding or deporting him; it simply means that summary notification cannot be effectuated, but that the alien is instead entitled to have his case considered in accordance with the procedures governing exclusion or deportation. See generally 8 U.S.C. 1251(a)(1) (authorizing deportation of aliens who were excludable at the time of entry); *Landon* v. *Plasencia*,

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[6] Under 8 C.F.R. 205.1(a)(8), approval of a petition for a visa based on the beneficiary's status as a child of a lawful resident alien is automatically revoked if the beneficiary marries before leaving for the United States. Subsection (d) of that regulation provides that when it appears to the district director that approval of a petition has been automatically revoked, he shall notify the consular office having jurisdiction over the visa application and shall mail a copy of the notice to petitioner's last known address.

459 U.S. 21, 25-28 (1982) (discussing exclusion and deportation proceedings). Thus, the BIA's ruling that Section 1155 does not preclude deportation in the present case is in accordance with the plain meaning of the statute.[7]

Moreover, even if Section 1155 were ambiguous, the BIA's interpretation would nonetheless be correct. Under the BIA's interpretation, an alien who has withheld crucial information demonstrating his ineligibility for a visa can be excluded or deported so long as the INS follows the proper procedures. Under petitioner's interpretation, however, as the court of appeals recognized (Pet. App. 3a), an ineligible alien, such as petitioner, could obtain admission to this country by engaging in fraud or concealment, and the INS would be powerless to respond. Such a result could not possibly have been intended by Congress.

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[7] Apart from the decision in the present case, there appears to have been no published judicial decision specifically addressing the applicability of the notice requirement of 8 U.S.C. 1155 in exclusion or deportation proceedings to determine the validity of a visa pursuant to 8 U.S.C. 1182(a)(20). Two leading immigration treatises, however, have indicated that the government's failure to give notice under Section 1155 does not ensure the alien's lawful admission. See 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 3.5i, at 3-60.6 - 3-60.7 (rev. ed. 1986) (footnote omitted) (if notice not given under Section 1155, approval of the visa is not disturbed and "the beneficiary's admissibility is determined at the time he applies for admission to the United States"); 1 A. Fragomen, A. Del Rey & S. Bernsen, *Immigration Law and Business* § 3.7, at 3-117 (1985) (indicating that if notice under Section 1155 is not given prior to the alien's departure for the United States, his admissibility can be challenged in exclusion proceedings or the INS can attempt to deport him under 8 U.S.C. 1251(a)(1), which permits deportation of aliens excludable at the time of entry). Similarly, several courts have held that an alien who has been admitted to the United States in a procedurally regular fashion, but who has not complied with substantive legal requirements for admission, has not been "lawfully admitted" for permanent residence. See, *e.g.*, *Monet* v. *INS*, 791 F.2d 752, 753-754 (9th Cir. 1986); *In re Longstaff*, 716 F.2 1439, 1441 (5th Cir. 1983), cert. denied, 467 U.S. 1219 (1984).

See generally *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542-543 (1940) (same).

As the court of appeals recognized (Pet. App. 3a-4a), petitioner's deportation proceeding gave him a "fair and adequate opportunity to rebut the Service's allegations that his visa was invalid." And petitioner makes no claim that the deportation proceeding was somehow defective. Petitioner has therefore been given every right to which he was entitled, and the court of appeals properly denied his petition for review.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1986

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[8] Petitioner also claims (Pet. 6, 8) that the government's failure to notify him of the invalidity of his visa pursuant to Section 1155 deprived him of due process and estopped the INS from deporting him. Those claims are groundless. The reason he was not notified of the invalidity of his visa prior to departure for this country is that he had concealed from the INS his change in marital status.

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA 22041

File: A37 277 276 – Buffalo September 4, 1986

In re: RAJINDER SINGH SACHDEV

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Leo E. Ypsilanti, Esquire
291 Broadway, Suite 1200
New York, New York 10007

ON BEHALF OF SERVICE: Michael Rocco
General Attorney

CHARGE:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(20), I&N Act, 8 U.S.C. 1182(a)(20) – no valid immigrant visa

APPLICATION: Reconsideration; Termination

ORDER:

PER CURIAM. The respondent, again, moves for reconsideration of our decision of March 7, 1985, finding him deportable as charged. On June 20, 1985, we denied the respondent's initial motion to reconsider. We again deny the motion because we conclude that the new motion contains only a reiteration of the same arguments rejected

by this Board on June 20, 1985, and by the U.S. Court of Appeals for the Second Circuit in *Sachdev* v. *INS*, 788 F.2d 912 (2d Cir. 1986).

We again conclude that the record contains clear, convincing, and unequivocal evidence of the respondent's deportability under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), as required by *Woodby* v. *INS*, 385 U.S. 276 (1966), and 8 C.F.R. 242.14(a). The respondent freely admitted under oath that he had married two months prior to his admission into the United States as the unmarried son of a lawful permanent resident of the United States (Tr. at 2). Counsel for the respondent specifically admitted this marriage prior to the respondent's admission (Tr. at 1). The respondent's continued reference to our decision in *Matter of Salazar,* 17 I&N Dec. 167 (BIA 1979), is unconvincing. This is not a case involving section 205 of the Act, 8 U.S.C. § 1155, like *Salazar* in which the visa petition was withdrawn by the petitioner but the respondent had no actual notice of the withdrawal prior to his admission into the United States.[1] Rather, this respondent was deportable as charged because he was married prior to his admission, not because his visa was revoked. *Matter of Alarcon,* 17 I&N Dec. 574 (BIA 1980). Thus, he no longer was the unmarried son of a lawful permanent resident of the United States when he entered the United States as a second

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[1] Where the Service is aware that a visa petition has been withdrawn, the Act requires notice of the automatic revocation of the approval of the visa petition to the beneficiary. *See* section 205 of the Act, 8 U.S.C. § 1155; *Matter of Salazar, supra.* However, when the visa has been revoked because the alien has married, such revocation is not the determinative factor regarding deportability. The determinative factor is that the respondent is now married, and has actual notice of the fact that he is no longer unmarried.

preference immigrant. He was aware of the fact that he was married, and had been given notice that if he married he would no longer qualify for second preference immigrant status. The record contains the Statement of Marriageable Age Applicant (OF 237) (Group Exh. 2) giving him notice that he would lose his second preference status if he married before immigrating into the United States. *Matter of Agustin* 17 I&N Dec. 14 (BIA 1979); *Matter of Wang,* 16 I&N Dec. 87 (BIA 1977). The respondent had indicated in his visa application (Form 230, #30) that he was able to read and write English, as the court noted. 788 F.2d at 914.

/s/ MARY M. DUNNE
Acting Chairman

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